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NO. 90-1156

Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1990

NEW ORLEANS PUBLIC SERVICE, INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS THE ALLIANCE FOR AFFORDABLE ENERGY, INC., et al.

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QUESTION PRESENTED

Whether a State-Authorized Utility Regulator, in Setting Intrastate Retail Rates for Electricity, Has Authority to Determine Whether a Local Utility Acted Imprudently in Failing to Diversify Its Power Supply Portfolio And in Failing Even to Investigate Off-System Sales of Power?

RULE 29.1 STATEMENT

Respondent The Alliance for Affordable Energy, Inc. is a Louisiana non-profit corporation. It has no parent company or subsidiaries. Citizens for Safe Energy, Inc. is a Louisiana non-profit corporation. It has no parent company or subsidiaries.

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CITATION OF OPINIONS

The opinion below is reported at NOPSI v. The Council of the City of New Orleans, 911 F.2d 993 (5th Cir. 1990). On February 8, 1991, the Fifth Circuit issued a correction to the opinion it had issued on August 29, 1990. Specifically, the Fifth Circuit withdrew incorrect language stating that the Council, after its extensive investigation, allowed 9% of Grand Gulf in NOPSI's retail rates. Instead, the corrected opinion reported that the percentage allowed in rates by the Council amounted to 14%. See Joint Appendix 16 (corrected version). (This correction makes clear that the percentage allowed by the Council's Order was different from the percentage they had sought before FERC.)

COUNTERSTATEMENT OF THE CASE

A. The Parties

Under Louisiana law, Respondent City Council for the City of New Orleans ["Council"] is the local ratemaking body with final authority over the retail rates charged by local electric and gas utilities. NOPSI v. The Council of the City of New Orleans, 911 F.2d 993, 997 (5th Cir. 1990); Joint Appendix ["J.A."] 11, at 15. See 16 U.S.C. § 824(b); La. Rev. Stat. Ann. §§ 33:4405, 33:4495 (West 1988). See also New Orleans Home Rule Charter § 4-1604.

Petitioner New Orleans Public Service, Inc. ["NOPSI"] is a producer, wholesaler, and retailer of electricity. It provides retail electricity to the City of New Orleans, except for the neighborhood of Algiers, which is served by Louisiana Power and Light ["LP&L"].

Alliance for Affordable Energy v. New Orleans, 578 So.2d 949, 953 (La. App. 4th Cir. 1991), pet. for cert. filed, No. 91 C 1475 (La. June 24, 1991). NOPSI, LP&L, Arkansas Power and Light ["AP&L"], and Mississippi Power and Light ["MP&L"] are wholly owned operating subsidiaries of Entergy Corporation (formerly known as Middle South Utilities ["MSU"]). J.A. 12. MSU operated an integrated "power pool" in which NOPSI and its sister power companies transmit the electricity they produce to a central dispatch center. Each company then draws back the power it needs to meet demand. NOPSI v. The Council of the City of New Orleans, 491 U.S. 350, 353 (1989) ["NOPSI III"].

The Alliance for Affordable Energy ["Alliance"] and Citizens for Safe Energy, Inc. ["SAFE"] are Louisiana non-

profit corporations. They are dedicated to protecting the public interest and ensuring fair and affordable utility practices locally and regionally. The Alliance was founded in 1985 and has approximately 450 members. The Alliance serves Louisiana's 1,700,000 gas and electricity ratepayers through educational programs promoting energy efficiency and citizen participation in decision-making processes. The Alliance also acts as a non-partisan watchdog monitoring the political, financial, technical, and environmental complexities of utility services in the region. SAFE, incorporated in 1982, is concerned primarily with energy-related environmental and consumer issues. Gary L. Groesch is a ratepayer of NOPSI, receiving electrical service in the City of New Orleans. [Hereinafter, the

Alliance, SAFE and Groesch are referred to collectively as "Alliance, et al."]

B. Historical Background -- The Costs of Grand Gulf

During the 1950s and 1960s, most of the generating plants in the MSU system were fueled by oil or natural gas. J.A. 13. In the late 1960s, MSU projected an increase in demand. MSU said it sought to meet that projected demand by constructing coal and nuclear generating plants, to diversify MSU's power supply portfolio. "[MP&L] was charged with constructing two plants at Port Gibson, Mississippi, to be known as Grand Gulf 1 and 2." NOPSI, 911 F.2d at 995. The Grand Gulf project, however, quickly proved too burdensome for one company to develop. MSU created yet another subsidiary, Middle South Energy, Inc. ["MSE"] (now known as Systems Energy

Resources, Inc., or "SERI"), which would "finance, own, and operate the Grand Gulf plants." Id. (The Board of Directors of SERI is composed of the presidents of the Entergy operating companies and the president of Entergy. Alliance, 578 So.2d at 954 n.2. Thus, the president of NOPSI has one vote on the SERI Board.) SERI owns 90% of Grand Gulf 1, while another, non-affiliated utility owns the other 10%. Technical services are provided by still another MSU subsidiary, Middle South Services, Inc. (MSS). NOPSI, 911 F.2d at 995-96.

In 1974, MSE contracted with these operating subsidiaries to finance the Grand Gulf project. J.A. 13. "The companies agreed to pay for the construction of the plants in exchange for the right to their output." Id. At that time, construction costs for both

plants were estimated at $1.2 billion. As the project progressed, consumer demand for electric power proved to be much lower than MSU and the power companies had projected. Regulatory delays, enhanced construction and safety requirements resulting from the Three Mile Island disaster, and high inflation rates led to spiraling costs on the Grand Gulf project. As a result, MSE suspended construction of Grand Gulf 2, but it continued to build Grand Gulf 1. Id.

When Grand Gulf 1 finally became operational in July 1985, the construction costs totalled approximately $3.65 billion, or roughly $3 billion more than the original estimate of $600 to $800 million for that plant. The cost overruns amount to an increase of 450% to 600%. Alliance,

578 So.2d at 955 n.3.

C. NOPSI'S Grand Gulf Costs

In late 1979, before Grand Gulf 1 became operational and before its ultimate cost was known, NOPSI applied to the Council for a "capacity adjustment clause" which would have authorized an automatic "pass-through" to New Orleans ratepayers of NOPSI's share of all future Grand Gulf construction costs. Id. at 995.

In January 1980 -- nine months after the Three Mile Island accident, but before the Council had acted on NOPSI's pass-through application -- NOPSI management undertook a voluntary commitment to purchase a 29.8% share of Grand Gulf power from MSE. It undertook this commitment even though its actual consumption need was only 9%. Id. NOPSI did not inform the Council of its

commitment to the Grand Gulf project until May, 1980, when it applied to pass-through those costs to the ratepayers.

After conducting hearings on NOPSI's application in May and September 1980, the Council declined to adopt the capacity adjustment clause. Id.

In 1982, MSU filed a Unit Power Sales Agreement with the Federal Energy Regulatory Commission ["FERC"]. The Agreement allocated shares of the output of Grand Gulf 1, and required each of MSU's subsidiary operating companies to pay for the shares specified. These payments were to cover construction costs of the plant. Under the agreement AP&L was not obligated to purchase any Grand Gulf power. J.A. 13-14. LP&L, which had not completed its plant, was obligated to purchase 38.57%; MP&L was

obligated to purchase 31.63%; and NOPSI was obligated to purchase 29.8%. Id. at 14. MSU also filed a new System Agreement with FERC, which set forth the terms and conditions for coordinated operations and wholesale transactions among these four companies, but did not deal with the Grand Gulf costs. Id.

D. FERC Proceedings

FERC assigned the agreements to two separate Administrative Law Judges ["ALJs"] for the statutorily required task of determining whether they were just and reasonable. Both judges held that the failure to distribute the Grand Gulf costs among all members of the power pool rendered the agreements unduly discriminatory; ALJ Head further held that these costs should be allocated in proportion to each company's relative system demand.

Middle South Services, Inc., 30 F.E.R.C. ¶ 63,030, pp. 65,170-65, 173 (1985) (ALJ Head) (System Agreement); Middle South Energy, Inc., 26 F.E.R.C. ¶ 63,044, pp. 65,105-08 (1984) (ALJ Liebman) (Unit Power Sales Agreement).

FERC consolidated the proceedings for review, and, on that review, determined that an adjustment of the shares allocated in the Unit Power Sales Agreement was necessary in order to render both agreements just and reasonable among the four companies. FERC reduced NOPSI's share of Grand Gulf costs from 29.8% to 17%. The New Orleans City Council had argued for a 9% share for NOPSI. J.A. 14. (See "Citation of Opinions" section, above.)

FERC found that Grand Gulf 1 had been planned, constructed, and completed to meet the needs of the MSU System "as

a whole." See Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 362-63 (1988); Middle South Energy, Inc., 31 F.E.R.C. ¶ 61,305, (1985). FERC further found that this was part of a "reasonable" system plan to diversify power sources, so it established rates allowing MSE to recoup 100% of its Grand Gulf costs from the power companies. FERC determined that the four companies should take shares of the System's total nuclear power in proportion to their relative demand for all forms of energy generated by the system. MP&L, 487 U.S. at 364. As NOPSI's demand was 9% of the total system demand, FERC required it to bear 9% of the System's total nuclear power costs. But because NOPSI had no nuclear plant of its own, FERC required it to bear 17% of the Grand Gulf costs (to

cover 9% of the total nuclear power costs). J.A. 15 n.3.

The U.S. Court of Appeals for the D.C. Circuit ordered FERC to reconsider the allocations. Mississippi Indust. v. FERC, 808 F.2d 1525, modified on rehearing, 822 F.2d 1104 (D.C.Cir.), cert. denied, 484 U.S. 985 (1987). On reconsideration, FERC reaffirmed its original allocations. The D.C. Circuit then affirmed that decision. City of New Orleans v. FERC, 875 F.2d 903 (D.C. Cir. 1989), cert. denied sub nom. Mississippi v. FERC, 110 S.Ct. 1805 (1990).

E. The NOPSI I Case

After Grand Gulf became operational in July 1985, NOPSI filed another application with the Council to recover its construction and operating costs from the ratepayers. If granted, that

application would have resulted in an immediate 60% increase in retail utility rates. Alliance, 578 So.2d at 955. Though the Council denied an immediate rate increase, it offered NOPSI interim rate relief. NOPSI rejected this offer and filed suit in the U.S. District Court for the Eastern District of Louisiana against the City, its mayor, and members of the City Council (collectively and individually). Id. The district court dismissed that suit, holding that under the Johnson Act, 28 U.S.C. § 1342, it lacked jurisdiction to proceed. The court further ruled that even if it did have jurisdiction, it would be required by Burford v. Sun Oil Co., 319 U.S. 315 (1943), to abstain. The U.S. Court of Appeals for the Fifth Circuit reversed, but then withdrew its original opinion and, instead, affirmed

on rehearing, finding that abstention was proper under both Burford and Younger v. Harris, 401 U.S. 37 (1971). See NOPSI v. The City of New Orleans, 782 F.2d 1236, modified on rehearing, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987) ["NOPSI I"].

F. The Council's Investigation and Order

On October 10, 1985, the Council passed Resolution R-85-636 undertaking an investigation into the prudence of NOPSI's participation in the Grand Gulf project and the resulting costs incurred, as well as NOPSI's efforts to minimize such costs. Alliance, 578 So.2d at 955. The resolution specifically provided that, in determining the appropriate retail rate increase, the Council would not seek to

invalidate any of the agreements surrounding Grand Gulf 1 nor would it order NOPSI to pay MSE a wholesale rate other than the rate approved by FERC. J.A. 16; NOPSI III, 491 U.S. at 356.

NOPSI responded to that Resolution by filing, in federal district court, a second suit which sought to enjoin the Council from holding the hearings. The district court dismissed on grounds of ripeness, and, in the alternative, abstained. Alliance, 578 So.2d at 955. The Fifth Circuit affirmed on the ground of lack of ripeness. NOPSI v. The Council of the City of New Orleans, 833 F.2d 583 (5th Cir. 1987) ["NOPSI II"]. Therefore, the Council's hearings were allowed to proceed.

"In March 1986, the Council entered into a partial settlement with NOPSI under which NOPSI agreed to absorb $51.2

million of the Grand Gulf costs, and the Council allowed NOPSI to phase in an interim rate increase, subject to the results of the Council's prudence investigation." Alliance, 578 So.2d at 955.

"The Council held hearings on the question of prudence from March 4, 1986, through February 24, 1987. In addition, the Council accepted into the record of that hearing written testimony, depositions, and reports prepared by expert witnesses. In April 1987, the Council completed the record of its investigation and began deliberations, which NOPSI attempted to prevent by seeking an injunction from the federal district court. This request was later dropped by NOPSI." Id.

After the Council completed its extensive investigation, it issued a

final Rate Order on February 4, 1988. J.A. 16; NOPSI III, 491 U.S. at 356. The investigation concluded that, at a minimum, NOPSI was imprudent in incurring approximately 30% (about $476 million) of Grand Gulf's $1.567 billion total costs for New Orleans, and that it had done virtually nothing to assess or minimize its risks. Id. The Rate Order found "that NOPSI's management failed to protect the interests of its ratepayers, and the company's conduct fell short of prudent utility management, to the detriment of its ratepayers and shareholders." Alliance, 578 So.2d at 956.

Fearing that disallowance of the entire amount would force NOPSI into insolvency, the Council made a one-time imprudence deduction of $150 million, which, on the basis of still further

caution, it reduced to $135 million. As a result, $186.2 million of the imprudently incurred Grand Gulf costs were disallowed (the $135 million disallowed by the Council's Order plus the $51.2 covered by the partial settlement). Thus, the Order allowed the remainder of these imprudently incurred costs (approximately $290 million) to be passed on to the ratepayers.

G. The State Court Proceedings

NOPSI then filed complaints against the Rate Order in both state and federal court. J.A. 16. In Louisiana's Civil District Court for the Parish of Orleans, NOPSI's case was consolidated with two previously filed suits: one filed by the Council seeking a declaratory judgment on the validity of its Rate Order, and one by consumer

advocates (the instant Respondents -- the Alliance, SAFE, and Groesch). The Alliance's suit challenged the Council's decision to disallow only $135 million of the total of $476 million in costs the Council had found to be imprudently incurred. Alliance, 578 So.2d at 956.

The Civil District Court upheld the Council's Rate Order, affirmed its validity, and denied the petitions of both NOPSI and the Alliance. That court "held that the rate order's findings were not preempted by federal law, and that its disallowance of imprudent costs was just and reasonable and supported by substantial evidence." Id.

The Louisiana Court of Appeal for the Fourth Circuit affirmed the Civil District Court's opinion insofar as it upheld the validity of the Council's prudence investigation and Order, noting

"[w]e find not only that substantial evidence in the record shows that NOPSI acted imprudently, but that the preponderance of the evidence would support the same conclusion." Id. at 964. Further, the Fourth Circuit found "there is no basis in law for the use of a balancing test [between ratepayers' and a utility's interests] in a case where costs have been found to be imprudent." Id. at 971. Thus, that court ruled that the Council had exceeded its authority when it allowed NOPSI to pass through imprudent costs to innocent ratepayers. The court held that the pass-through to ratepayers of imprudently incurred costs "would be in violation of the ratepayers' constitutional rights to property and due process of law under the Louisiana Constitution, Art. I, Sections 2 and 4,

and the U.S. Constitution, Amendments 5 and 14." Id. at 973.

H. The Federal Court Proceedings Before and After NOPSI III

In its suit in the U.S. District Court for the Eastern District of Louisiana, NOPSI argued that the Council could not prevent the pass-through of any Grand Gulf costs because the Council's investigation and Order were preempted by federal law under Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986). J.A. 16-17. The district court abstained under Burford and Younger, and the Fifth Circuit affirmed the district court's dismissal on abstention grounds. J.A. 17. NOPSI v. Council of New Orleans, 850 F.2d 1069 (5th Cir. 1988).

This Court then reversed, finding abstention improper on both grounds, but

holding that the Council's actions were not preempted by federal law. NOPSI III, 491 U.S. 350 (1989).

On remand, NOPSI again argued in the district court that the Council's Order was facially preempted and that the Council was attacking the FERC allocation. J.A. 17. The federal district court held that the Council's Order was not "facially" preempted, and stayed the so called "pretext" claim because the Louisiana trial court had already issued a judgment in favor of the Council on that issue. Id. (The Louisiana Civil District Court had held that the Council's Order was supported by substantial evidence. Id. See p. 20, above.)

The federal district court stayed further proceedings, based upon Colorado River Water Conservation Dist. v. United

States, 424 U.S. 800 (1976), and Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983). The Fifth Circuit affirmed.

Relying upon NOPSI III, the Fifth Circuit affirmed the district court's determination that the Council's Rate Order was not facially preempted by the FERC allocation. NOPSI v. The Council of the City of New Orleans, 911 F.2d 993, 995 (5th Cir. 1990) (Higginbotham, J., joined by Wisdom and Duhe', JJ.). The Fifth Circuit also found that the judgment rendered in the parallel state proceeding "weighs in favor of a stay" of NOPSI's "pretext" claim. Id. at 1005. Therefore, the Court ruled that the district court had not abused its discretion in deferring to the state courts on that claim. The Fifth Circuit concluded: "[f]inding no merit in

NOPSI's facial preemption challenge and that the district court properly stayed the pretext challenge, we affirm." Id. at 1005-06.

This Court granted NOPSI's writ of certiorari on April 22, 1991. NOPSI v. The Council of the City of New Orleans, 111 S.Ct. 1617, 113 L.Ed.2d 715 (1991).

SUMMARY OF ARGUMENT

Petitioner NOPSI and Amicus FERC have sought to interpret federal administrative authority under the Federal Power Act ["FPA"] too broadly. Their interpretation substantially exceeds Congressional intent, as shown by the plain meaning of the key statutory language and by the legislative background and history of that language. Indeed, their extreme interpretation goes so far as to raise

constitutional problems which could be easily avoided by a narrower, more reasonable interpretation. NOPSI's approach would also have detrimental policy implications for the federal system and for consumers.

NOPSI's preemption analysis is too simplistic. Other federal statutory schemes show that different regulatory tasks can be handled by different tiers of government. The focus should be on the nature of the regulation and type of decision involved. When that standard form of preemption analysis is adopted, it becomes clear that the Council's hearing and Order are not preempted explicitly, implicitly, or as a result of a direct conflict with federal power. Hence, both NOPSI's "facial" preemption claim and its preemption by "pretext" claim must fail.

This is not, in any event, the appropriate case to decide these issues. The courts below should have stayed this action out of deference to the state court judgment, pursuant to 28 U.S.C. § 1738 (full faith and credit statute) and Louisiana's lis pendens statute. NOPSI's claims have been litigated in the state court proceedings, on a fuller factual record, and the federal aspects of those state decisions can later be reviewed by this Court on petition for certiorari, if necessary.

ARGUMENT

I. NOPSI'S OVERLY BROAD INTERPRETATION OF THE FEDERAL POWER ACT IS INCORRECT.

The question presented to this Court is whether the Council, in setting retail rates, had authority to determine whether NOPSI acted imprudently in failing to diversify its power supply

portfolio and in failing even to investigate off-system sales of power after the Grand Gulf project was underway. Review of the language of the FPA, the background and history of that Act, and the general history of public utilities regulation demonstrate that the Council did have precisely this authority.

The question is not whether the New Orleans City Council had jurisdiction to determine the prudence of NOPSI's original decision to participate in the construction of Grand Gulf 1. Nor is it whether the Council had jurisdiction to determine what percentage of Grand Gulf's power output could be allocated to NOPSI. These questions, which have been previously resolved in favor of FERC, are merely straw men, and they shed little light on the question

actually pending before this Court.

The regulatory decisions rendered by the Council concerned the setting of appropriate retail rates, in light of NOPSI's deficient and negligent business practices. This type of decision is well within the Council's regulatory authority under the FPA.[1]

A. The Council's Authority Here is Fully Supported By Statutory Interpretation Based Upon the Plain Meaning of the Federal Power Act.

There can be little doubt that the regulation of the business practices of, and retail rates charged by, utilities has long been a traditional state function. In the prior round of this

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[1] Though the Fifth Circuit's description of the Council's decision in temporal terms, see 911 F.2d at 997-98, seems to have invited opposition by NOPSI, the proper focus should be on the nature of the regulation and type of decisions involved. See Part II.C.2, below.

very case, this Court stressed that Louisiana has a "substantial, legitimate interest in regulating intrastate rates," NOPSI v. The Council of the City of New Orleans, 491 U.S. 350, 365 (1989) [NOPSI III]. The Court then reaffirmed that "the regulation of utilities is one of the most important functions traditionally associated with the police power of the States." Id., quoting Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983), and citing Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205-06 (1983); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of

New York, 447 U.S. 557, 569 (1980).[2]

In drafting the FPA, Congress directly protected this traditional state authority. The Act granted the Federal Power Commission ["FPC"] (now FERC) regulatory authority over certain specified aspects of the generation of electricity and "of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. . . ." 16 U.S.C. § 824(a) (1988) (emphasis added). See also 16 U.S.C. § 824(b)(1) (1988) (wholesale

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2 Indeed, this Court correctly noted that even "NOPSI does not deny that the State has an interest affirmatively protected by federal law in conducting proceedings to set intrastate retail electricity rates. . . ." NOPSI III, 491 U.S. at 366. Petitioner's objection is only to what it perceives to be the subject matter of these particular Council hearings.

sales in interstate commerce only).

The Act then specifies that "such Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the States." Id. (emphasis added). See also 16 U.S.C. § 824(b)(1) (1988) (denying FERC jurisdiction, inter alia, over "facilities used in local distribution or only for the transmission of electrical energy in intrastate commerce"). Congress thereby accepted the substantial tradition of state (and local) regulation of retail sales of energy. See Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515, 524-27 (1945).

Similarly, the Natural Gas Act ["NGA"], which employs parallel language (15 U.S.C. § 717(b) (1988)), was designed not to eviscerate state

authority, but rather to aid state regulation. See Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 517, 520-21 (1947). See generally Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981) (noting similarity of FPA and NGA for analytic purposes).

Thus, the plain meaning of the Act restricts federal regulation to wholesale sales in interstate commerce, while preserving state authority over intrastate sales. When applied to this case, the FPA mandates federal regulation of wholesale purchases among the MSU power pool members, but Council jurisdiction over the retail implications of NOPSI's potential off-system sales and diversification of its power supply portfolio.

B. The Council's Authority is Also Supported by the Legislative Purpose, Background, and History of the Federal Power Act.

The well-known background to the FPA makes it clear that Congress was not seeking to unleash the federal regulatory giant that NOPSI and FERC urge this Court to create.

The FPA emerged in the wake of Public Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). There, the State Commission attempted to regulate the rates at which a local utility could sell electricity wholesale to an out-of-state distributor. This Court "struck down that regulation, holding that, because it involved a transaction at wholesale, it imposed a 'direct' rather than 'indirect' burden on interstate commerce." Arkansas Elec. Coop., 461

U.S. at 378.

"Congress interpreted [Attleboro] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power." United States v. Public Util. Comm'n of California, 345 U.S. 295, 308 (1953) (emphasis added) (footnote omitted). Thus, Congress enacted the FPA with the intention of "filling the [regulatory] gap" created by Attleboro with respect to interstate wholesale rates. Arkansas Elec. Coop., 461 U.S. at 378-80. See generally Clinton, et al., FERC, State Regulators and Public Utilities: A Tilted Balance, 2 NAT. RESOURCES & ENV'T. (Spring, 1987).

Given this background to the FPA, it is not surprising that Congress included in § 201 of the Act (now

Sections 824(a) and 824(b)(1) of Title 16) a specific reservation of state regulatory authority over all other aspects of the regulatory process.

Indeed, Justice Jackson's detailed review of the history and background of the FPA, in Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 525-27, 529 (1945), revealed a "constant purpose to protect rather than to supervise authority of the States." See also S.Rep. No. 621, 74th Cong., 1st Sess. 48 (1935) (Subsection (a) "declares the policy of Congress to extend that [federal] regulation to those matters which cannot be regulated by the States . . . but not to impair or diminish the powers of any State commission."); id. at 18 (limitations upon federal commission's jurisdiction in each section in order to prevent

"encroachment" upon state authority); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935) ("As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."); id. at 8 ("Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.")[3]

The limiting statutory language throughout the FPA gives FERC jurisdiction only over wholesale prices. As a result of recent cases, see Part II.C.2, below, this Court has allowed

[3] Brief of Respondents the Council of the City of New Orleans ["Council's Brief"] at Part II discusses similar passages from the legislative history of the FPA and related federal statutes.

FERC to reach the outer perimeter of its potential jurisdictional authority under the FPA. Yet, in this case, NOPSI contends that FERC should have exclusive jurisdiction over all of NOPSI's prices, including even off-system sales and the rates paid by intrastate retail consumers. The line must be drawn here; this mushrooming of federal power should not be allowed to continue.

C. NOPSI's Expansive Reading of the Federal Power Act Disregards Critical Federalism Concerns.

A fully functioning federal system requires that States continue to play crucial roles, as politically accountable service providers and regulators. But NOPSI's overly broad interpretation of FERC's jurisdiction would undercut these basic federalism concerns, by allowing an unelected

federal agency to dictate both wholesale and retail rates for any utility involved in an interstate power pooling arrangement. See Petitioner's Brief ["NOPSI Brief"] at 24-25. See also Brief for the United States and the Federal Energy Regulatory Commission as Amicus Curiae Supporting Petitioner ["FERC Brief"] at 14; Brief of Edison Institute as Amicus in Support of Petitioner at 8.

1. Proper Statutory Interpretation Requires Taking Account of Federalism Concerns.

A statutory scheme involving cooperative federalism, such as the system developed under the FPA, not only defines federal regulatory power over national concerns but also confines that federal jurisdiction, and maintains a key role for state regulators and

consumers. As explained above, the plain meaning of the FPA's statutory language, the background to the Act, and its legislative history demonstrate a Congressional intent to protect the traditional and historic state regulation of utilities. See Parts I.A and B, above.

Of course, judicial interpretation must draw lines defining the federal and state regulatory spheres. Those lines should be drawn based upon the type of regulation and nature of the regulatory decision involved. For example, in Attleboro, this Court drew the line between state regulation of retail rates and federal regulation of wholesale rates. The FPA, enacted in response to Attleboro, was intended to give FERC only limited jurisdiction over interstate aspects of public utilities,

while preserving for the States their traditional regulatory functions. See Part I.B, above. Though modern developments, such as power-pooling arrangements, do present some complexities, none of them require abandonment of the States' key role under our federalism. See generally Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190 (1983).

In the instant case, NOPSI and its supporting Amici would have this Court take several uncharted steps beyond the current cases, by imposing exclusive federal jurisdiction to insulate all of NOPSI's management decisions, merely because NOPSI is involved in an interstate power-pooling arrangement. If NOPSI's theory of FERC's all-encompassing authority were accepted by

this Court, it would severely undercut essential principles of federalism (to the point of raising constitutional questions that can otherwise be avoided, see Part I.C.2, below). As Congress has not directly and explicitly manifested an intent to eviscerate this basic state power, a narrow reading of the FPA's plain terms is required, rather than FERC's or NOPSI's expansive exegesis. See NOPSI, 911 F.2d at 1002, citing California v. ARC Am. Corp., 490 U.S. 93 (1989), and Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

In interpreting the federalism concerns contained in the FPA, Justice Jackson explained:

> Congress is acutely aware of the existence and vitality of these state governments. . . . Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission.

> It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the "insulated chambers of the states" are still laboratories where many lessons in regulation may be learned. . . .

Connecticut Light & Power, 324 U.S. at 530. These federalism concerns should continue to inform this Court's statutory interpretation of the FPA, even in these days of interstate power pools.

2. The Constitutional Plan Places Constraints Upon Federal Interference With State Authority.

Under our federal system, the "Constitutional Plan," protects State sovereignty against inappropriate forms of interference by the federal government. See generally Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 381-82 (2d ed. 1988). The extent to which these

constitutional protections are judicially enforceable against assertions of federal agency power presents a difficult constitutional question. That difficult issue need not be confronted here, if a reasonable interpretation is given to the FPA -- one which takes account of its language, background, and history, and, which properly weighs state interest in the analysis.[4] See Parts I.A through C.1, above. However, if this Court takes NOPSI's expansive theory of FERC's exclusive jurisdiction seriously, then it should also ask whether Garcia v. San Antonio Metrop. Transit Auth., 469 U.S.

[4] This defense, based upon the judicially enforceable constitutional barrier protecting States against the inappropriate expansion of federal power, was not directly raised in the District Court or the Court of Appeals, as neither of those courts accepted the overly broad interpretation of FERC's jurisdiction now being pressed by NOPSI.

528 (1985), needs to be limited or overruled.

In Garcia, a bare majority of this Court rejected a claim that the Tenth Amendment protected state and local governments from compliance with the same provisions of the Fair Labor Standards Act that were applicable to private employers. A central premise of that decision was that "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations of federal power." Id. at 552. That point was supported by reference to the consistent Congressional solicitude toward state interests: "For example, the Federal Power Act, the National Labor Relations Act, . . . [and several other federal

statutes] all contain express or implied exemptions for States and their subdivisions." Id. at 553 (emphasis added) (footnote omitted).

A majority of the Court concluded that judicially enforceable constraints upon federal interference with the modus operandi of state and local governments was not necessary on the facts of Garcia, see 469 U.S. at 556.[5] However, NOPSI's approach to this case presents the issue more sharply and directly.

In the instant case, the elected City Council conducted a prudence investigation prior to approving retail utility rates -- precisely the authority

5 Nor did the tax statute in South Carolina v. Baker, 485 U.S. 505 (1988), or the spending condition in South Dakota v. Dole, 483 U.S. 203 (1987), require this Court to confront this difficult issue. See generally, Gelfand & Werhan, Federalism and Separation of Powers on a "Conservative Court", 64 TUL.L.REV., 1443, 1451-53, 1456 (1990).

reserved to such a state-authorized regulator. The Council based its decision upon NOPSI management's "ostrich" policy, which failed to deal realistically with, or even to recognize, skyrocketing costs. J.A. 171-72.

On the other hand, Amicus FERC, a federally appointed agency, here seeks to exceed its Congressionally granted authority, by insulating NOPSI from that local review of its imprudent and deficient management practices. Moreover, FERC never asserted jurisdiction over the subject matter of the Council's prudence hearing until this, the second Supreme Court stage of

this long-running case.[6] Under these circumstances, the "procedural safeguards" of the Congressional process referred to in Garcia[7] can hardly be

[6] See generally Council's Brief at Part II.B.2. Neither FERC nor NOPSI can find solace in City of New York v. FCC, 486 U.S. 57, 60 (1988), as this Court specifically did not address whether the agency had gone beyond its statutory authority.

[7] Respondents the Alliance et al. respectfully point out that current members of this Court, see e.g., Garcia, 469 U.S. at 579 (Rehnquist, J., dissenting); id. at 580 (O'Connor, J., dissenting), and many commentators have questioned the broad scope of Garcia, especially where the federal regulation undercuts the political accountability or disrupts the modus operandi of state or local governments. See, e.g., TRIBE, supra at 378-400; WORKING GROUP ON FEDERALISM OF DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA (Nov. 1986); Chapin, Reinvigorating Federalism, 19 URB. LAW. 523, 523-26 (1987); Gelfand, The Constitutional Position of American Local Government, 14 HASTINGS CONST'L L.Q. 635, 654-55 (1987); Howard, Garcia and the Values of Federalism, 19 GA. L.REV. 789 (1985); Stephenson & Levine, Vicarious Federalism, 19 URB. LAW. 683-88 (1987). See also Gelfand & Werhan, supra.

considered sufficient to protect State prerogatives against federal agency overreaching. See generally, NOPSI, 911 F.2d at 1002, quoting MP&L, 487 U.S. at 391 (Brennan, J., dissenting) (fearing that States will be divested "of authority to determine the prudence of costs incurred by retail utilities whenever those utilities belong to an interstate power pool"). See also FERC v. Mississippi, 456 U.S. 742, 777 (1981) (O'Connor, J., dissenting) (warning against "harness[ing] state power for national purposes").

In setting retail rates, the Council must take FERC-approved wholesale costs as a given cost-component, but the Council still must have the power to consider how NOPSI management deals with the risks associated with these and other costs.

NOPSI and similar investor-owned utilities have a state-granted monopoly; market forces do not operate to guide or direct their business affairs. The regulation of fair retail rates must be provided by the Council. Therefore, the state (or local) regulator has to be able to evaluate a local utility's deficient business decisions and failure to reduce economic risks. That crucial regulatory power should have constitutional protection. See FERC v. Mississippi, 456 U.S. at 781 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("Utility regulation is a traditional function of state government, and the regulatory commission is the most integral part of that function.") (footnote omitted).

D. Adopting NOPSI's Interpretation Would Produce Adverse Impacts Upon Consumers.

Under NOPSI's misinterpretation of the FPA, utilities would be encouraged, if not forced, to join multistate holding companies in order to compete in a market in which intrastate utilities are carefully regulated by the States, while interstate utilities are regulated solely by a federal agency which, commentators contend, tends to favor the interests of utility stockholders over consumers.

According to a recent report of the National Regulatory Research Institute at Ohio State University, there are significant differences in the ratemaking policies and practices of FERC and state regulatory agencies in areas such as "earnings on assets not yet in service, treatment of plant

cancellation costs, treatment of excess generation capacity," and what it terms FERC's "lenient examination of the prudence of the seller of wholesale power." Clinton, et al., FERC, State Regulators and Public Utilities: A Tilted Balance, 2 NAT. RESOURCES & ENV'T 11 (Spring, 1987), quoting Pfeffer & Lindsay, The Narragansett Doctrine (1984). The States' role in protecting the local interest is essential to balancing the national interest in regulating commerce, and the local interest in protecting constituent consumers. Clinton, supra, at 45-46.

FERC approves agreements involving electric generation facilities a decade or more in advance of changes in retail rates. See NOPSI, 911 F.2d at 996-97 (describing FERC acceptance of the representations of MSU executives here).

According to NOPSI, those generation costs become the principal components of the utility's costs. NOPSI Brief at 25 n.27, and accompanying text. FERC also argues that state regulatory commissions, in setting retail rates, cannot even consider how the utility has managed these costs. FERC Brief at 11-12, 14-15. See also NOPSI Brief at 30-35. Hence, under these expansive theories, FERC's tentacles reach both forward and backward, throughout the regulatory process, precluding any state regulation of the rates of any utilities that are part of an interstate power pool. These misguided theories have foreclosed consumers from knowledgeable participation in the process, given the extended time-line involved.[8]

[8] Finally, NOPSI's expansive theory of FERC jurisdiction would lead to absurd practical results whenever a

But deficient business decisions, such as the total failure of NOPSI executives to pursue off-system sales and other methods of reducing economic risks, should not fall upon the ratepayers. The resulting costs should be borne by the shareholders of the utility, who should not be insulated from the consequences of negligent management through overly expansive theories of possible FERC jurisdiction. Alliance, 578 So.2d at 973.

Finally, it should be noted that Respondents the Alliance, et al., while supporting the crucial regulatory role of the Council, do not support all aspects of the Council's Ratemaking Order. In the instant case, as a result

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utility subject to a FERC order does sell power off-system. See Council's Brief at Part II.B.3 (providing illustrative examples).

of the Council's Order and a partial settlement, the ratepayers of New Orleans are shielded from only $186.2 million of costs found by the Council to be imprudent, but NOPSI has been allowed to recover $290 million of those imprudent costs.

"[B]oth law and public policy mandate that stockholders, not ratepayers, bear the burden of such costs." Id. at 969-74, and sources cited therein. Yet, the Council chose not to follow these well-established prudence principles, fearing that it could lead to corporate reorganization for NOPSI.

If the Council's reasoning held true in the general marketplace, "once the leadership of a business finds out that it cannot lose, it can no longer be held accountable for the reasonableness

of its decisions." The Alliance cannot accept such reasoning. Id. at 973 (quoting testimony of Dr. Jeffrey Barach). Dr. Barach also "suggested that the Council's decision to limit the amount of the disallowance would signal management 'that grossly imprudent acts are better than slightly imprudent acts'." Id.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED THE SUBTLETIES OF PREEMPTION DOCTRINES TO THIS CASE.

NOPSI's broad and simplistic interpretation of preemption ignores the ability of the Congress and this Court to divide a regulatory task into its component parts. Such a division has been properly done here. Interstate sales of wholesale electricity and allocations of power from an interstate pool have been regulated by FERC. By

contrast, the prudence of retail and off-system sales have been reviewed by the State-authorized regulator, in this case, the New Orleans City Council. See generally NOPSI III, 491 U.S. at 352, 367. This distribution of authority best complies with the language of the FPA, its background and history, and the federalism concerns so critical to Congress and this Court. See Parts I.A-C, above.[9]

In analyzing preemption issues, this Court traditionally begins with the presumption that state authority is not preempted. Moreover, "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."

[9] Even Justice Scalia's concurring opinion in MP&L, 487 U.S. at 383, oft-quoted by NOPSI and their Amici, speaks only to FERC's authority over electrical generation contracts and wholesaling.

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Thus, the "critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." Id. at 369 (emphasis added).[10]

Congressional intent may be expressed explicitly in the federal statute, may be implicit (occupation of the field), or may arise from a conflict between federal and state regulations. See Wisconsin Pub. Intervenor v. Mortier, 111 S.Ct. 2476, 2482 (1991). None of those three forms of preemption

10 City of New York v. FCC, 486 U.S. 57 (1986), does not authorize an agency to exercise broad authority without a direct statutory empowerment. This Court decided City of New York solely on the basis of the provisions of the 1984 Cable Act. This Court specifically declined to determine the legitimacy of the FCC's cable television policies prior to the passage of that Act. Id. at 70 n.6.

is present in this case.

A. Congress Has Not Explicitly Preempted the Field of Utility Regulation.

The FPA does not expressly preempt state retail rate-making authority. Indeed, the statutory language, background, and legislative history of the FPA demonstrate that Congress was especially protective of the States' traditional power to regulate local utilities. See Parts I.A-C, above.

If Congress had intended to provide FERC with the expansive authority to regulate all stages of ratemaking -- retail as well as wholesale -- such authority would have been detailed in the FPA. Congress is perfectly capable of stating whether or not an Act is intended to supersede state authority. Congress is also capable of delineating the specific areas of state authority

that are to be superseded.

Here, the position taken by NOPSI and FERC simply fails to acknowledge that Congress often provides for separate areas of state and federal control. In fact, the extent to which federal statutes preempt state law can range from almost complete federal preemption of a field to a very narrowly defined scope of federal authority.

The Employee Retirement Income Security Act (ERISA) provides an example of Congressional intent to preempt state authority broadly. ERISA's preemption clause supersedes any state law relating to employee benefit plans. 29 U.S.C. § 1144(a). See FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990).

At the other end of the spectrum are statutes, such as the Federal Insecticide, Fungicide, and Rodenticide

Act (FIFRA). 7 U.S.C. §§ 136, et seq. FIFRA's preemption of state authority extends only to state laws that regulate the labelling and packaging of pesticides. The statute very clearly leaves regulation of sales and use to the States. See Wisconsin Pub. Intervenor, 111 S.Ct. at 2486; Papas v. Upjohn Co., 926 F.2d 1019, 1023-24 (11th Cir. 1991).

The middle ground of the preemption spectrum is illustrated by statutes, such as the Communications Act, which expressly establish separate areas of regulation for federal and state agencies. In Louisiana Pub. Serv., this Court analyzed a direct conflict between state and federal regulations regarding the methods of depreciation to be used for certain telephone equipment. 476 U.S. at 358-59. See also Part II.C.1,

below. Despite the presence of that direct conflict, this Court found that Congress expressly intended to create a dual regulatory system, including possible "jurisdictional tensions." 476 U.S. at 375.

Similarly, in the Federal Power Act, Congress also plainly established such a dual regulatory system for electrical utilities -- federal regulation of wholesale interstate transactions, and State regulation of retail transactions. In the present case, the FPA plainly states that FERC has control only over wholesale rates for power sold in interstate commerce. NOPSI argues that the Council's retail Rate Order interfered with the FERC-approved wholesale rates.[11] NOPSI's

[11] NOPSI appears to make the claim of explicit preemption as part of its "facial preemption" argument, see NOPSI

argument can only be accepted, however, by misreading the FPA to say that FERC has regulatory authority over all stages of rate-making, from wholesale to retail, any time a utility is part of an interstate power pool arrangement. If Congress had intended to allow FERC to regulate and set intrastate retail rates, it could have expressed this intent in the FPA by simply adding the phrase "and retail" after all its references to "wholesale." Obviously, Congress did not do so, and as this Court "so often admonish[es], only Congress can rewrite this statute."

Brief at 37-45. But that claim has already been resolved against NOPSI both in this Court's prior decision, see NOPSI III, 491 U.S. at 363-64, and in the state proceedings, where NOPSI fully litigated the issue. See Part III.A, below. NOPSI simply seeks here a third bite of the well-gnawed apple. See Council's Brief at Part I.A. See also note 12, below.

Louisiana Pub. Serv., 476 U.S. at 376.

B. There Is No Implicit Preemption of the Field of Utility Regulation.

There is no basis for asserting that the federal government has occupied the field of electric utility regulation to the exclusion of State prudence investigations.

When Congress creates a regulatory agency and assigns it broad regulatory powers in a particular area, the grant may indicate a Congressional intent to preempt the field. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982). Again, however, it is a matter of degree. Despite substantial federal occupation, the States still might be allowed to regulate certain aspects of the subject matter, if those aspects are found to be sufficiently local in nature.

For example, Congress regulates the nuclear power industry extensively, through the Nuclear Regulatory Commission [NRC]. The NRC was created for the express purpose of promoting and regulating nuclear energy production. In Pacific Gas & Elec. Co. v. State Energy Resources Conserv. and Dev. Comm'n, 461 U.S. 190 (1983), this Court considered a California law which conditioned the construction of any new nuclear power plants within the state upon findings by a State agency that California possessed adequate disposal facilities. Because the California statute addressed economic problems rather than the health and safety considerations encompassed by the federal scheme, this Court held that the state statute was not preempted. Id. at 220-23. Justice White's opinion for the

Court explained:

> Early on, it was decided that the States would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize that partnership.

Id. at 194. He added: "States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." Id. at 212 (emphasis added) (footnote omitted).

The Pacific Gas & Elec. Court further opined: "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments." Id. at 207-08

(emphasis added). In the instant case, a ruling that the Council's prudence investigation is preempted would create such an "inconceivable" regulatory vacuum. While a state prudence inquiry would be allowed with regard to non-affiliated utilities, no one would be able to conduct them for utilities involved in interstate power pools.

It is also clear that Congress did not intend to "occupy the entire field" of utility regulation when it enacted the FPA. Otherwise, Congress would not have specifically preserved the important, historically-based role for the States in the statutory language itself. See Parts I.A and C, above. Maintaining the delicate state-federal regulatory balance requires recognition of utility regulation as a traditionally important aspect of the state police

power. See NOPSI III, 491 U.S. at 365; FERC v. Mississippi, 456 U.S. 742, 781 (1981) (O'Connor, J., dissenting); Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981); Arkansas Elec. Coop., 461 U.S. at 377.

C. There is No Actual Conflict Between the Actions of FERC and the Council's Investigation and Order.

NOPSI's claim that the Council's prudence investigation and Order are preempted because they conflict with FERC orders is simply incorrect. Preemption through an actual conflict occurs when compliance by the regulated body with both statutes is impossible or, when the state and federal actions are found to have conflicting objectives.

1. The Council's Order Is Not Inconsistent With FERC's Allocation.

Even if the federal and state regulations do not conflict "upon their face" (where compliance with both is not possible),[12] the state law may be preempted because the Court finds that the objectives behind the two regulations are inconsistent. Transcontinental Gas Pipeline Corp. v. State Oil and Gas Bd. of Mississippi, 474 U.S. 409 (1986).

The Council's inquiry into whether NOPSI's negligence in failing to pursue the option of selling power off-the-system was not preempted, as it was sufficiently local in nature. The inquiry did not call into question the

[12] NOPSI's "facial preemption" challenge may fall into this category. If has, nonetheless, already been rejected. See note 11, above, and Part II.C.2, below.

federally approved allocation of power,[13] the amount of power that NOPSI was obligated to purchase, or the federally approved price of that power. Instead, the Council's inquiry focused upon NOPSI's total failure to investigate reducing the economic risks.

Under NOPSI's approach to this subject, once a FERC rate order has been issued (or even anticipated), members of interstate power pools would have no incentive to reduce risks or costs by changing their mix of power sources or selling power off-system. In the instant case, the economic risks were not even weighed, and the options available to NOPSI were not pursued,

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13 The Council fully conceded that NOPSI is obligated to purchase the federally approved allocation of power at the federally approved wholesale price. See Council Brief at Part II.B.1.

despite representations made by NOPSI's management, under oath, to the City Council.

NOPSI claims that the Council has never identified a "sucker" utility that would or could have purchased the excess capacity, see NOPSI Brief at 44, but this argument begs the crucial question. In retrospect, it may now be extremely difficult to determine the range of options for off-system sales at a point in time in the past. It is, however, disingenuous for NOPSI to blame the City (and burden its ratepayers) for this current difficulty. Because of their "ostrich" policy, NOPSI management failed to explore any of these off-system sales options, despite their repeated statements that such options were possible.[14] This information is,

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14 See the discussion in Part II.B.2,

and was, peculiarly within NOPSI's province and knowledge; NOPSI's management utterly failed to investigate the matter.

2. Neither Nantahala Nor MP&L Control This Factually Distinct Case.

Both FERC and NOPSI overread Mississippi Power & Light Co. v Mississippi ex rel. Moore, 487 U.S. 354 (1988), to arrive at the erroneous conclusion that no Council prudence investigation of any kind can be held, even though neither the type of investigation conducted by the New Orleans City Council nor its regulatory subject matter were before this Court in MP&L.

FERC and NOPSI arrive at their erroneous conclusion based upon the

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below, regarding NOPSI President Cain's representations to the Council.

"logic" of the rule in MP&L. FERC Brief at 15, 18, 20; NOPSI Brief at 28-34. Yet, they disregard the actual language in this Court's prior opinion in this case, see NOPSI Brief at 36. They apparently assume that this Court did not mean what it said when it stated that the Council's hearing not facially preempted by "the federal statute, the regulations implementing it, or the case law applying it." NOPSI III, 491 U.S. at 367.

The instant case is readily distinguishable from both Nantahala and MP&L. In fact, this Court has already correctly characterized the Council's Rate Order as follows:

> The Council has not sought directly to regulate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocations of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the

> prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking steps of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.

NOPSI III, 491 U.S. at 367. See also id. at 352.

On remand, the Fifth Circuit agreed with this characterization of the Council's Rate Order and found that the Order was not facially preempted, under either Nantahala or MP&L. That court reasoned that the Council's Order considered only those imprudent costs, incurred as a result of deficient NOPSI management, after NOPSI had entered into the Grand Gulf agreement. NOPSI, 911

F.2d at 1001.

The Fifth Circuit seemed to stress the sequence of the decisions, but the proper focus should not be on the time frame. (Though the state regulation often will come after the FERC order, it need no do so.) Instead, as this Court has noted, the proper focus for preemption analysis is on the type of decision or the nature of the regulation. See generally Arkansas Elec. Coop., 461 U.S. at 379-80.

As the Fifth Circuit correctly discerned, the only basis of challenge remaining has to be that the Council's action allegedly was a "pretext." Even assuming, however, that the "pretext" issue has been properly raised in this case, that issue involves only sufficiency of evidence -- an issue resolved against NOPSI in the parallel

state court proceedings. See Part III, below.

NOPSI attempts to bring the instant case within the broadest reach of this Court's fact-bound language in Nantahala and MP&L. Those cases hold that a state regulator, in setting retail rates for a utility which is part of an interstate power pool, must treat that utility's FERC-approved wholesale costs as a reasonably incurred operating expense. That is, such power costs become one given component when calculating an appropriate retail rate. See Nantahala, 476 U.S. at 967.

In Nantahala, the North Carolina Utility Commission concluded that FERC's allocations of low-cost, wholesale power were improper. In effect, the State Commission replaced FERC's order with one that the Commission thought to be

more fair. It thereby made a conflicting decision about the allocation of power within an interstate power pool.

In delivering the opinion for this Court, Justice O'Connor reasoned that a decrease in retail rates would be improper if based only upon an allocation calculation that ignored the FERC allocations. Id. at 968. Justice O'Connor was also careful to point out, however, that a decrease in retail rates would be proper and within the State Commission's power and jurisdiction provided that decrease was based on other factors, such as lower transmission or operational costs. Id.

As the Fifth Circuit correctly recognized, Nantahala clearly leaves room for the local ratemaking authority to disallow imprudent operating expenses

as long as those expenses do not contradict FERC's allocations. That is, the Nantahala decision fully recognizes the area of decisionmaking still reserved to state regulators under the Act; the Council's proceedings fall well within that reserved area. See NOPSI III, 491 U.S. at 352, 367. Those proceedings found NOPSI's management to have been grossly deficient in failing to investigate possible reductions of economic risks.

In MP&L, this Court ruled that an inquiry by the Mississippi Public Service Commission into the prudence of management decisions concerning the construction and completion of the Grand Gulf nuclear facility was preempted. In that case, FERC had found the decision to build to be reasonable, and had allocated power from the facility among

MSU subsidiaries. Hence, a State inquiry into the wisdom of constructing the plant was invalid -- an example of preemption by conflict. MP&L, 487 U.S. at 376.[15]

In the instant case, by contrast, the Council's Order does not question the reasonableness of expenses incurred as a result of NOPSI's participation in the Grand Gulf project. Instead, the Council's Order reviews whether NOPSI executives acted imprudently in failing to examine the economic risks of Grand Gulf and nuclear power, and in failing

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15 In MP&L, this Court ruled that the state prudence hearing could not even be held because it was preempted. NOPSI's argument that the same rule applies here is wrong, because it is the "law of the case" that the New Orleans City Council hearing was allowable. See NOPSI III, 491 U.S. at 372 (claim ripe when Council's Order entered); NOPSI v. Council, 833 F.2d 583 (5th Cir. 1987) (claim not ripe before Council investigation held).

to diversify the NOPSI power supply portfolio once those risks become obvious.

Indeed, NOPSI and MSU represented that they entered the nuclear field specifically to diversify. See "Historical Background" section of Counterstatement of the Case, above. Diversification must be considered a continuing goal, not just a one-time-only decision. It requires continued prudent monitoring of risks and of possible instability. In this case, the Council concluded that such monitoring would have led reasonably prudent management to mitigate growing risks through further diversification, or at least through off-system sales.

The Council found that in light of escalating costs of nuclear power, NOPSI should have realized that allocations of

nuclear power by the pool (and later by FERC) would result in serious economic risk and consequently, NOPSI was under the obligation to minimize those risks by diversifying its power sources. See MP&L, 487 U.S. at 367. Further, the Council found that if NOPSI had pursued this course, it could have saved an amount equal to one-third to two-thirds of the amount of its Grand Gulf obligation.

The Council's Order does not question NOPSI's obligation to purchase the FERC allocated power, the quantity, or the price. See NOPSI III, 491 U.S. at 367. While NOPSI could not refuse to purchase the power, it did have the right, and claimed the ability, to sell power off-the-system. Indeed, its officers represented to the Council they could (and would, if necessary) do so,

but NOPSI, as a result of negligent management, failed to pursue this option.

NOPSI boldly asserts that it should not be bound by the promises and representations its own President, James Cain, made to the Council. Its argument, though vitriolic,[16] is misguided. If Cain really believed that off-system sales at an attractive price were possible, his failure to pursue this option was imprudent, so the ratepayers should not suffer. Alternatively, if he did not believe his representations to the City Council when he made them, then he was prevaricating, and, again, the ratepayers should not be responsible. Management decisions --

16 See NOPSI Brief at 44 n.50 and even more strongly in their Application for a Writ of Certiorari filed in the Louisiana Supreme Court, at 17-19.

whether competent, incompetent, or dishonest -- determine costs, see NOPSI Brief at 25 n.27, 44 n.50, but the ratepayers should not have to bear the burden of costs that are inflated because of deficient and seriously imprudent management decisions. J.A. 161. Furthermore, NOPSI's reliance on a footnote in MP&L, see NOPSI Brief at 44 n.50, is also misplaced. In that footnote, this Court simply stated that false statements by the regulated utility cannot alter the federal-state regulatory balance. 487 U.S. at 376 n. 14. That is quite different from the situation here. The Council is simply relying upon Cain's representation -- that NOPSI could find possible buyers -- in order to show that off-system sales were a viable option -- a representation which NOPSI now suggests was either

unreasonable or false when made.

The instant case provides this Court with the opportunity to clarify the line between state and federal jurisdiction over the activities of utilities involved in interstate power pools. This Court should draw that line in a manner which reflects the necessary respect for the delicate balance between these two layers of government in our federal system.

III. THE STATE COURT PROCEEDING IS THE PROPER FORUM FOR NOPSI'S CLAIMS, PARTICULARLY THE "PRETEXT" CLAIM.

Though this Court remanded to the courts below for further proceedings, the federal courts did not need to rule on NOPSI's claims. Instead, they should have stayed the case in favor of the state court proceedings and rulings.

Before the federal district court,

on remand, was able to consider the issues, the state trial court, in a case initiated by NOPSI,[17] rejected both the "facial" preemption claim and the "pretext" claim now pressed upon this Court by NOPSI. This Court will, if it deems necessary, have an opportunity to review any ultimate decision by Louisiana Supreme Court.[18] Hence, there

[17] NOPSI's suit was combined with the suits previously filed by the Alliance and by the Council. See "The State Court Proceedings" section in the Counterstatement of the Case, above.

[18] The Louisiana Court of Appeals for the Fourth Circuit ruled that the Council's Order was supported by substantial evidence, was not preempted by federal law, and did not violate the Commerce Clause. The Court also held that all imprudently incurred costs be borne by NOPSI. Alliance, 578 So.2d 949

NOPSI filed with the Louisiana Supreme Court an application for certiorari, seeking review of the entire Fourth Circuit decision. The Council filed a petition seeking review only of the portion of the decision which forbid any imprudent costs to be passed on to ratepayers. The Alliance has not joined either petition. To date, the Louisiana

is no reason to stretch the boundaries of this case to decide the so called "pretext" claim. Furthermore, there is not a sufficient record in the federal proceedings to allow a definitive ruling on that claim.

A. The Federal Full Faith and Credit Statute Required the Federal District Court to Stay This Case.

Under 28 U.S.C. §1738 (1988), the "judicial proceedings" of "any court of any" state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they were taken."

In interpreting this "full faith and credit" provision, this Court has explained: "It is now settled that a federal court must give to a state-court

Supreme Court has not ruled on the petitions.

judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered." Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1983). See also Allen v. McCurry, 449 U.S. 90, 96 (1980); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982); E. CHEMERINSKY, FEDERAL JURISDICTION 440-42 (1989) (Migra illustrates the Supreme Court's view that it is more important to give full faith and credit to state court judgments than to allow separate fora for state and federal claims).

Because § 1738 specifically refers to state law, the credit which the federal courts, in the instant action, should give to the state court judgments is determined by the credit those judgments are given in the Louisiana

courts. The applicable Louisiana statute at the time was the lis pendens provision. La. Code Civ. Proc. Ann. art. 531 (West 1960).[19] It provided:

> When two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object, the defendant may have all but the first suit dismissed by the excepting thereto as provided by Article 925. When the defendant does not so except, the plaintiff may continue prosecution of any of the suits, but the first final judgment shall be conclusive of all.

La. Code Civ. Proc. Ann. art. 531 (West 1960). Thus, Article 531 requires that: (1) the state court judgment be a final judgment; (2) the parties be the same in both actions; (3) the relevant cause be the same; and (4) the identity of the thing demanded be the same. See Jensen

[19] A new statute, effective January 1, 1991, also provides res judicata effect. See La. Rev. Stat. Ann. § 13:4231 (West 1991).

Constr. Co. v. Dep't of Transp. & Dev., 542 So.2d 168 (La. App. 1st Cir. 1989).

1. Final Judgment

Under La. Code Civ. Proc. Ann. art. 1841 (West 1990), a judgment is a determination of the parties' rights in an action, and it may be either interlocutory or final. "A judgment that determines the merits in whole or in part is a final judgment." Art. 1841 (emphasis added).

For the purposes of lis pendens, all that must be shown is that the state trial court decision was a final judgment. This is a lower standard than that for res judicata, which, in addition, requires identity of the thing

adjudged.[20] Thus, it is not relevant that the state trial court's decision was appealed, because the only dispositive factor for the purposes of lis pendens is whether the state court's decision was a final judgment.

It is well-established in Louisiana law that a "final or definitive judgment is one which decides all of the points in controversy . . . . The appeal merely

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20 Article 3556(31) defines the "thing adjudged" as that which has been decided by a judgment from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing has elapsed, or because it has been confirmed on the appeal. La. Civ. Code Ann. art 3556(31) (West 1953). See Preis v. Standard Coffee Service Company, 545 So.2d 1010, 1012 (La. 1989); Ward v. Pennington, 523 So.2d 1286, 1290 (La. 1988); Smith v. Howell Industries, 579 So.2d 1236, 1238 (La. App. 3d Cir. 1991). As that requirement was not met here, the Fifth Circuit was correct in rejecting a res judicata claim. But, as noted, lis pendens has a different, lesser requirement.

suspends the execution of the judgment pending review." Buuck v. Fos, 84 So.2d 186, 187-88 (La. 1955) (emphasis added). See also Voisin v. Luke, 142 So.2d 815, 817 (La. App. 1st Cir. 1962).

In fact, the state trial court here rendered a "final judgment" on the merits of the case. The court held that the Council's actions were not inconsistent with federal law, its conclusions were derived rationally, and they were supported by substantial evidence.

2. Identity of the Parties

Here, there is sufficient identity of the parties to meet the requirement of Article 531. This requirement is met whenever "the same parties, their successors, or others appear so long as they share the same 'quality' as parties." Welch v. Crown Zellerbach

Corp., 359 So.2d 154, 156 (La. 1978). Ultimately, the determination for the identity of the parties requirement "turns on whether the parties added or omitted would be necessary to reach a judgment on all the issues asserted against the common parties in both suits." Fincher v. Insurance Corporation of America, 521 So.2d 488, 490 (La. App. 4th Cir.), writ denied, 522 So.2d 570 (La. 1988).

In the state action, the relevant parties are NOPSI, the Council of the City of New Orleans, and the Alliance and its related groups ["Alliance, et al."]. In the federal action, the named parties are NOPSI and the Council of the City of New Orleans, and the Alliance,

et al., as intervenors.[21]

3. Identity of Cause

For the purposes of Article 531, the term "cause" requires only that the two actions share an identity of the legal demands made. See Safeco Insurance Company of America v. Palermo, 436 So.2d 536, 537 (La. 1983); Mitchell v. Bertolla, 340 So.2d 287, 291-92 (La. 1976) (holding that "cause of action" in art. 2286 means "cause"); Rivet v. First Financial Bank, FSB, 538 So.2d 216, 220-21 (La. 1989).

In the state court action, NOPSI argued that the Council's Rate Order is

[21] The fact that the Alliance, et al. are named parties in the state case and are intervenors in the federal case does not change the "quality" of the parties. The resolution of the issues will not be affected simply because the Alliance, et al. intervened in the action. Moreover, after being granted intervention pursuant to Fed. R. Civ. P. 24, the Alliance, et al. became named parties.

(1) preempted by the FERC allocation order and (2) if not preempted, the Order is unsupported by the evidence. In that action, both the Council and the Alliance disagreed with NOPSI. Further, the Alliance argued that the Council lacked the authority to moderate its disallowance to prevent NOPSI's bankruptcy. Alliance, 578 So.2d at 953.

In the federal action, NOPSI argued that the Council's Rate Order was (1) facially preempted and (2) the stated reasons for the Council's Order were a pretext for an impermissible attack on FERC's order. NOPSI, 911 F.2d at 995. As this comparison reveals, the parallel state and federal proceedings have the facial and "pretext" preemption claims in common.

4. Identity of the Thing Demanded

"In determining whether the requirement of the identity of the thing demanded is met, courts look to the ultimate object of the suit." Jensen, 542 So.2d at 173.

Here, both the state action and the federal actions sought the same type of relief. More specifically, in both the state and the federal actions, NOPSI wants a declaration that the Council's Order was preempted by the FERC decrees. Such a declaration would enable NOPSI to pass on the entire FERC-approved costs to New Orleans ratepayers. Compare NOPSI, 911 F.2d at 997, with Alliance, 578 So.2d at 953.

In both actions, the Council southt to have their investigation and Order uphels. In both cases the Alliance, et al., supported the Council's authority

to conduct the investigation and issue an Order, but sought broader relief for ratepayers.

Therefore, both actions seek review of the Council's authority, with all parties demanding for themselves the same relief in both cases. There is sufficient identity of the thing demanded for purposes of lis pendens. Rivet, 538 So.2d at 221; Jensen, 542 So.2d at 172; Daul Ins. Agency Inc. v. Parish of Jefferson, 447 So.2d 1208, 1211 (La. App. 5th Cir. 1984).

In sum, the facts show that the state and the federal claims have the same parties, the same cause, and the same thing demanded. Thus, the first final judgment, i.e. the state trial court decision, is "conclusive" of all. Moreover, under Migra, 465 U.S. at 80-81, the federal action should never have

proceeded, for if it had been instituted in Louisiana court, that court would have stayed the action on the grounds of lis pendens. Therefore, under § 1738, as interpreted by Migra, the federal district court should have done the same. This Court should dismiss this Petition and remand, with an instruction to stay in favor of the pending state court proceedings.

B. Even if This Court Does Not Apply § 1738, the "Pretext" Claim Should Not be Considered Without a Complete Record.

In any event, proper judicial administration requires waiting for a fully developed record before ruling on the "pretext" claim. The state court proceedings have such a developed record.

If this Court insists upon federal, rather than state, judicial

consideration of the "pretext" claim, then Respondents the Alliance, et al., urge this Court to remand for a full evidentiary hearing (so the issue can be considered on a complete record). The lawyers representing both NOPSI and the Council have agreed that such an evidentiary hearing would be needed. See J.A. 327-29. See also NOPSI III, 491 U.S. at 363-65, 367 (noting the need for factual record on the pretext claim, and describing some of the facts to be considered).

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifth Circuit decision.

In the alternative, this Court should affirm on the facial preemption claim and remand for a full evidentiary

hearing on the so called "pretext" claim.

Respectfully submitted,

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